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Remarks.

Reconsideration of the application as amended is respectfully requested.

No claim presently stands allowed. Claims 1-4 have been canceled. Claims 5-6 have been previously withdrawn from consideration. Claims 7-11 are new.

Interview Record

A telephonic interview was conducted with the Examiner herein upon request of counsel, on December 15, 2003.

In accordance with MPEP 713.04 and 37 C.F.R. §1.133, Applicant's counsel hereby specifically affirms the content of the Examiner's Interview Summary as being correct, in all respects. Counsel incorporates the same herein by reference thereto, and therefore believes that there is no necessity of filing a separate "complete written statement" herein.

Claim Rejections - 35 U.S.C. §103

The Examiner again rejected claims 1 and 2 as being unpatentable over Kaufmann (5,672,224) in view of O'Reilly, et al. (5,373,966).

Applicant has presented new claim 7, which is believed to distinguish Applicant's invention over the cited references, and to

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also address the indefinite "product-by-process" language of previously examined claims.

Applicant respectfully points out that new claim 7 positively recites claim limitations of a multiple-use tube container with a dispensing cap, such being shown and described in the application as filed (e.g., Fig. 4 at 30 of Applicant's drawings; and page 5, lines 10-12 of Applicant's specification) and thus clearly being distinguished from O'Reilly's single use sachet. As stated previously by Applicant, it is obvious that a single use sachet is decidedly different in both form and function from Applicant's multiple-use tube container.

Further in this regard, the Examiner at page 5 of the instant action cites a dictionary definition of a "tube" as "a small, flexible cylindrical container sealed at one end and having a screw cap at the other ..." (emphasis added). It is readily apparent that O'Reilly's single-use sachet is not contemplated by the definition and therefore cannot be fairly characterized as being a tube, since O'Reilly does not include a screw cap. Providing a screw cap with a single-use sachet would be nonsensical, since a single use sachet is to be used once and then discarded. In contrast, Applicant's claimed invention is directed to a multiple-use tube container and not a single-use sachet.

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New claim 7 positively recites a claim limitation of a crimp closure portion, such being shown and described in the application as filed (e.g., Fig. 4 at 40 of Applicant's drawings; and in Applicant's specification at page 5, lines 18-22, and page 7, lines 12-22) and thus eliminating the problematic product-by-process language identified by the Examiner.

The Examiner also asserts that Applicant's invention amounts to a mere re-arranging of parts. However, Applicant respectfully notes that Applicant's label is not simply "stuck" to a container as in Kaufmann, but rather is securely joined to the multiple-use tube container by way of the crimp closure portion as described and claimed. Nowhere in the references is joining the label to the container via a crimp closure portion either taught or suggested.

The Examiner additionally states that Kaufmann, as modified by O'Reilly, discloses a pliable attachment tongue as recited in Applicant's claims. Applicant respectfully points out, however, that Kaufmann's element 5 is an "edge 5 (the hinge)" of the label (col. 3, line 1). As is well known in the labeling art, a hinge simply serves as a point of connection between independent label plies. Note that in Applicant's invention, the label hinge (e.g., Fig. 2 at H-H of Applicant's drawings; and in Applicant's specification at page 6, lines 8-9) is separate and distinct from the novel attachment tongue (e.g., Fig. 2 at 230 of Applicant's

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drawings; and in Applicant's specification at page 6, lines 9-12). Further, and perhaps even more importantly, there is no teaching or suggestion whatsoever in Kaufmann of any capability of attachment of his hinge (5) to any container, nor any suggestion in either Kaufmann or O'Reilly of such attachment via a crimp closure portion.

As to the repeated rejection of the dependent claims over Kaufmann in view of O'Reilly, et al. and in further view of Weiss, et al., Applicant renews his observations on the two references as stated above. Additionally, the teaching of Weiss is not directed to a tear off portion, but rather to a label for a specimen container which indicates, by alignment of indicia between separated label portions, desired "overtightening" of a lid to which one of the label portion is affixed. In no manner is the label "torn off" from the container; indeed, Weiss' label is simply scored to provide an indication of proper closure alignment and nothing more.

Once again, Applicant respectfully asserts that his novel invention as described and claimed is nowhere taught or suggested by the references, either alone or in combination.

Something in the prior art must suggest the desirability, and thus the obviousness, of making the combination proposed by the Examiner. Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044 (C.A.F.C. 1988). In this case, Applicant respectfully asserts that such suggestion of desirability simply does not exist.

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Obviousness must be determined in the context of what the prior art fairly teaches; there must be some teaching in the prior art of the proposed combination for an obviousness rejection to be proper. For reference structures to be properly combined, and to thereby render a claimed invention obvious, there must be some motivation for the combination. There must be some teaching, suggestion, or incentive to make the combination claimed by the applicant.

Northern Telecom, Inc. v. Datapoint Corp., 15 U.S.P.Q.2d 1321 (C.A.F.C. 1990). In this case, Applicant respectfully asserts that no such motivation or incentive exists to combine the references as cited by the Examiner.

Conclusion.

This Amendment is presented in accordance with revised 37 C.F.R. §1.121.

Claims 1-4 have been canceled. Claims 5-6 have been previously withdrawn, and Applicant continues to assert a right to present them in a continuing application. New claims 7-10 are presented to overcome the stated rejections. New claim 11, an independent method claim, has been added.

For the reasons stated above, Applicant believes that his invention disclosed and claimed in the instant application is

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patentable. Therefore, allowance of claims 7-11 as now presented appears to be in order and such action is accordingly requested.

Also transmitted herewith are a PETITION FOR EXTENSION OF TIME UNDER 37 CFR 1.136(a) to respond to the Office Action, along with a Request for Continued Examination (RCE) Transmittal and a Credit Card Payment Form for payment of the extension of time and RCE fees.

The Applicant and his counsel would appreciate any further inquiry from the Examiner, if deemed necessary after consideration of this Amendment, by way of a telephone conversation with counsel so that a timely Notice of Allowance may be issued.

Respectfully submitted,
Joseph D. Franko, Sr.

Dated:

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